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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1947

No. 40

DONALD WADE, PETITIONER,

vs.

NATHAN MAYO, AS STATE PRISON CUSTODIAN OF THE STATE OF FLORIDA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR CERTIORARI FILED FEBRUARY 13, 1947.

CERTIORARI GRANTED JUNE 9, 1947.

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IN THE DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA, JACKSONVILLE DIVISION.

#845-J-Civ.

Filed May 10, 1946.

DONALD WADE,

Petitioner,

versus

NATHAN MAYO, as State Prison Custodian,

Defendant.

PETITION FOR WRIT OF HABEAS CORPUS.

To: The Honorable Louie W. Strum, Judge of the United States District Court for the Southern District of Florida, Jacksonville Division:

Now comes your petitioner, Donald Wade, and respectfully represents unto Your Honor that he is restrained of his liberty by the Honorable Nathan Mayo, Commissioner of Agriculture of the State of Florida, and state prison custodian of the State of Florida, contrary to the laws and Constitution of the United States of America. Your petitioner shows as follows:

1.

Your petitioner was informed against in the Criminal Court of Record in the County of Palm Beach, State of Florida, for the offense of breaking and entering.

2.

Your petitioner was brought on for trial in the Criminal Court of Record in Palm Beach County, Florida, upon the

charge of breaking and entering, and when his case was called for trial, your petitioner stated to the Judge that he was without money with which to employ counsel and asked the Court to appoint counsel for his defense before the trial of the case began, which request of your petitioner was denied.

3.

Your petitioner shows that he is eighteen years of age and that the only education he has had is in the common schools through the eighth grade, and that he knows nothing about the procedure and practice in the Courts, and he was forced to trial without the aid of counsel in violation of the constitutional rights as guaranteed to him under the Constitution of the United States, and without due process of law he was tried, convicted and sentenced to a term of five years in the state penitentiary of Florida where he is now held.

4.

Your petitioner further shows that he is advised and believes an appeal to the Supreme Court of Florida would be of no avail and would be useless for the reason that the Supreme Court of Florida has decided in the case of Watson vs. The State, 194 Sou. 640, and Johnson vs. The State, 4 Sou. (2nd) 671, that it has no power of reversal of a conviction because defendants were not represented by counsel, and for that reason failed to obtain a fair trial, except in capital cases, and this case is not a capital case.

5.

Your petitioner further shows that he was without any funds whatsoever to employ counsel in his behalf, and

that the only recourse he had was to ask that counsel be appointed to represent him in the trial of said cause.

6.

Your petitioner further shows that in order to exhaust all of his remedies in the State Courts before appealing by writ of habeas corpus to the District Court that he filed a petition for writ of habeas corpus which writ was granted and that the same was quashed upon motion before the Honorable Jos. S. White, Judge of the Circuit Court, of Palm Beach County, Florida, a copy of said order being hereto attached, marked petitioner's exhibit "A", and made a part of this petition.

7.

Your petitioner further shows that appeal was made to the order quashing the writ of habeas corpus to the Supreme Court of Florida and the Attorney General filed a motion to dismiss said appeal, a copy of which motion is hereto attached, marked petitioner's exhibit B, and made a part of this petition.

8.

Whereupon, the Supreme Court of Florida considered the motion to dismiss and by order of said Court dismissed the said appeal, copy of which is hereto attached, marked petitioner's exhibit C, and made a part of this petition.

9.

Your petitioner further shows that he is advised and believes that he has exhausted every remedy available to him in the State Courts of Florida, and the Courts of last

resort in Florida, and there is no way in these Courts to obtain the redress for the wrong committed against him in denying him due process of law as guaranteed under the Constitution of the United States.

10.

Your petitioner further shows that he is not guilty of the charge made against him, and that if he had had counsel to represent him, and present his defense, he verily believes that he would never have been convicted of the crime with which he was charged, and given the sentence of five years in the state penitentiary.

11.

Your petitioner further shows that he is being held in the State Road Prison Camp, under the Honorable Nathan Mayor, as Commissioner of Agriculture and as State Prison custodian, in Suwanee County, Florida, and deprived of his liberty by reason of the sentence issued in the Criminal Court of Record in Palm Beach County, Florida, wherein he was tried without the benefit of counsel, and delivered to the said State Prison custodian.

Wherefore, your petitioner prays that Your Honor grant unto him the United States most gracious writ of habeas corpus, to be delivered to the said Nathan Mayo, as State Prison custodian of Florida, and returnable forthwith before Your Honor according to the form in the statute in such case made and provided, and then and there to show cause why he holds your petitioner unlawfully in custody, and upon what legal grounds he seeks to deprive your petitioner of his liberty and his right to a fair trial with-

out the aid of counsel, and petitioner prays, upon final hearing, he may be discharged from further custody.

(S.) DONALD WADE,
Petitioner.

State of Florida,
County of Suwanee.

On this day personally appeared before me, the undersigned authority, Donald Wade, who being first duly sworn, deposes and says that he is the petitioner in the foregoing cause, and that he has read the above petition and that the facts therein set out are true.

(S.) DONALD WADE.
(S.) H. B. WOOLEY,
(Notary Seal) Notary Public, State of Florida at Large.

My commission expires: March 8, 1947.

4 PETITIONER'S EXHIBIT A.

Order Quashing Writ.

In the Circuit Court of the Fifteenth Judicial Circuit of Florida, in and for Palm Beach County.

Donald Wade, Petitioner,
vs.
John Kirk, as Sheriff of Palm Beach County, Florida, Respondent.

This cause was heard, after due notice, upon the Motion of the State Attorney to quash the writ of Habeas Corpus, and argument of counsel.

In consideration of the premises, it is Ordered and Adjudged that the Motion is granted and the Petitioner is remanded to the custody of the Sheriff of Palm Beach County, Florida. See Watson v. State, 142 Fla. 218, 194 So. 640; Johnson v. State, 148 Fla. 510, 4 So. (2d) 671.

Done And Ordered this March 22nd, A. D. 1945.

JOS. S. WHITE,
Circuit Judge.

5

PETITIONER'S EXHIBIT B.

Motion to Dismiss Appeal.

In the Supreme Court of Florida.

Donald Wade, Appellant,
vs.
John Kirk, as Sheriff of Palm Beach County, Florida, Appellee.

Comes now the appellee by its undersigned attorneys, and shows unto the Court that the transcript of record filed herein reveals the following facts, to-wit:

That on March 15, 1945, the appellant was tried, convicted, and sentenced for breaking and entering, not a capital offense.

That on the next day, to-wit: March 16, 1945, the appellant filed his petition for habeas corpus in which he raises the single point that he was unable to employ counsel because of the lack of funds and that the Court denied his request that counsel be appointed for him.

That it does not appear that the appellant took any appeal or that he even filed a motion for new trial.

That the Circuit Judge made his order quashing said writ of habeas corpus and remanding the appellant upon the authority of decisions of this Court cited in said order.

Wherefore, the appellee says that the appeal taken herein is frivolous and without merit, and could serve no purpose other than to obstruct and delay justice; and the appellee moves the Court to dismiss said appeal.

Respectfuly submitted.

J. TOM WATSON,
Attorney General.
REEVES BOWEN,
Assistant Attorney General,
Attorneys for Appellee.

6 PETITIONER'S EXHIBIT C.

In the Supreme Court of Florida, January Term, A. D. 1945.

Monday, May 14, 1945.

Donald Wade, Appellant,
vs.
John Kirk, as Sheriff of Palm Beach County, Florida, Appellee.

Upon consideration of the motion of the Attorney General as counsel for appellee in the above cause to dismiss the appeal therein, it is ordered that said motion be and the same is hereby granted and the appeal which

was entered in this cause in the Circuit Court of Palm Beach County of March 23, 1945 and recorded in minutes of said Court Book 51, page 145 be and the same is hereby dismissed.

A true Copy.
Test:
(SS)
Clerk Supreme Court.

APPLICATION FOR DONALD WADE FOR LEAVE TO SUE AS A POOR PERSON.

7 Filed May 10, 1946.

In the District Court for the Southern Division of Florida, Jacksonville Division.

Donald Wade, Petitioner,
vs. #845-J-Civ.
Nathan Mayo, as state prison custodian, Defendant.

To the United States of America, Southern District of Florida, Jacksonville Division:

Donald Wade, being first duly sworn, deposes and says that he is a citizen of the United States and of the State of Florida; that he is entitled to and intends to commence an action in this Court against Nathan Mayo, a citizen of the State of Florida, in the matter of a habeas corpus petition asking for habeas corpus writ, and that the proposed petition for writ is exhibited along with this affidavit; that affiant is without any assets and that he has no income whatsoever but is being held in the State Penitentiary; that because of his Poverty

affiant is unable to pay the costs of said action or to give security therefor; that there is no other person interested in the said cause of action, or recovery thereunder, and that affiant believes and he is entitled to the redress to be sought in the said action.

Wherefore, affiant prays that he may have leave to prosecute the said action without being required to prepay costs or fees or to give security therefor, pursuant to U. S. C. Title 28, Sections 832-836.

DONALD WADE,
Petitioner.

Subscribed and sworn to before me this the 26 day of April A. D. 1946.

H. B. WOOLEY,
(N. P. Seal) Notary Public, State of Florida at Large. (Seal)

My commission expires: March 8, 1947.

8

ORDER.

Filed May 10, 1946.

(Title Omitted.)

The Court having read and considered the petition herein, and supporting affidavits, it is—

Ordered And Adjudged:

1. Petitioner's motion for leave to proceed in forma pauperis is granted.

2. The respondent, Nathan Mayo, as State Prison Custodian, shall produce the body of petitioner, Donald Wade, before this Court at Jacksonville, Florida, on Friday, May 17, 1946, at eleven o'clock AM, together with cause and authority for detention of said Donald Wade, then and there to be heard and dealt with in accordance with law.

3. At same time and place the Court will hear all witnesses for all parties, so that the matter may be considered and disposed of on the merits.

Done And Ordered at Jacksonville, Florida, May 10, 1946.

(Sgd.) LOUIE W. STRUM,
(Louie W. Strum)
U. S. District Judge.

(Recorded in Jacksonville Civil Order Book No. 9, page 771.)

Copies—
Eugene M. Baynes, Comeau Bldg., West Palm Beach.
Hon. J. Tom Watson, Attorney General, Tallahassee.
Hon. Nathan Mayo, as State Prison Custodian, Tallahassee.

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9 RETURN OF RESPONDENT.

Filed May 17, 1946.

(Title Omitted.)

Comes now the respondent, Nathan Mayo, as Commissioner of Agriculture and State Prison Custodian of the

State of Florida, and for return to the petition for writ of habeas corpus and the order of this Honorable Court pursuant thereto, says:

That he holds the petitioner, Donald Wade, in custody under and by virtue of commitment which issued out of the Criminal Court of Record of Palm Beach County on the 14th day of March, 1945. Said commitment requires the respondent to hold said petitioner until the latter has served a term of five years in the State Prison of Florida, which was imposed on him by said Court upon his conviction for the offense of breaking and entering with intent to commit grand larceny. That a true and correct photostatic copy of said commitment is attached hereto as Exhibit 1 and is hereby made a part hereof.

That the petitioner has not served the term of imprisonment imposed by the sentence upon which said commitment is predicated, and he is lawfully restrained of his liberty under said commitment.

That information was filed against the petitioner for said offense on the 19th day of February, 1945, and he was duly arraigned under said information and plead not guilty thereto. That the case was thereupon set for trial and he was informed that any witnesses desired by him for his defense would be subpoenaed. That, in response, he stated that he had no witnesses which he wished subpoenaed in his behalf.

That the case duly came on for trial on March 14, 1945. That at no time prior to the calling of said case for trial on said date did the petitioner make any request that the Court appoint counsel to defend him. That, at the time said case was called for trial on said

date, the petitioner for the first time requested the Court to appoint such counsel, which request was properly denied by the trial Court.

That during the process of impaneling a jury to try the case, the petitioner was advised of his right to challenge jurors and was advised that he could excuse as many as six jurors from serving in his case without assigning any reason therefor. That, after the petitioner was so advised, he accepted a jury tendered by the State with the statement to the effect that they were agreeable to him, and said jury was thereupon duly sworn.

That at the trial the State produced evidence quite sufficient to sustain the verdict of guilty rendered by the jury. That two of the State's witnesses admitted their participation in the breaking and entering charged against the petitioner, and both testified that they and the petitioner jointly committed said crime.

That the petitioner during the progress of the trial was afforded opportunity and advised of his right to cross examine the witnesses presented by the State, but declined to exercise the right or to avail himself of the opportunity.

That the petitioner took the stand and testified fully in his own behalf. That his defense was that, being in the company of the two above mentioned State witnesses until just before the commission of the crime charged against him, he left them prior to the commission of the crime and did not participate in it in any way.

That no argument was made to the jury in the case by either side.

That the trial judge charged the jury fairly and in accordance with law, and said jury returned a verdict of guilty which is the basis of the petitioner's conviction, sentence and commitment.

That the petitioner was not a stranger to criminal procedure, he having plead guilty in November, 1943, to a charge of burglary then pending against him in the Circuit Court of Jackson County, Florida, and having served a portion of the sentence of imprisonment in the State Prison imposed upon him for said offense.

That petitioner was also committed to reform school on charge of breaking and entering, from which institution he escaped. That petitioner was upon another and different occasion convicted of petty larceny upon which judgment of conviction sentence was withheld.

Respondent denies the allegations of paragraph 5 of the petition filed herein that the only recourse the petitioner had was to ask that counsel be appointed to represent him in the trial of the cause and says that the petitioner was arraigned before the Court under the information charged against him on a day several weeks in advance of the day upon which the trial was had and that upon said arraignment the petitioner plead "not guilty". That upon a later date the defendant being in Court the case was assigned for trial upon a future day certain. That upon neither occasion did the petitioner make any request for the appointment of counsel to assist him in his defense or any representation to the Court that he was without funds or resources with which to employ counsel. That on the contrary during the time intervening between the date of his arraignment and the date of the trial the petitioner, through his efforts and those of others of his relatives, did endeavor

to enlist the services of attorneys to undertake the defense of the petitioner against the charges upon which information was presented against him, but that such efforts were vain for the reason that the facts and circumstances gave no promise of successful defense of the charges preferred.

That the petitioner is literate and intelligent. That he was kept advised of his rights as the trial progressed. That he fully presented his defense and received a fair and impartial trial.

That the respondent denies that the petitioner's constitutional rights were violated by the trial Court's denial of his request that counsel be appointed for his defense. That the respondent further denies that the petitioner was tried, convicted and sentenced without due process of law.

That on March 16, 1945, subsequent to the conviction and sentence of the petitioner, he filed in the Circuit Court of Palm Beach County, Florida, his petition for writ of habeas corpus in which he made substantially the same allegations as are contained in his petition herein, and in which he alleged that the refusal of the trial Court to appoint counsel for him was a denial of due process of law guaranteed to him by the Constitution and laws of the United States of America. That a true copy of said petition is attached hereto as Exhibit 2 and is hereby made a part hereof. That, as alleged in the petition herein, a writ of habeas corpus was granted by said Circuit Court. That, as is alleged in the petition herein and as is shown by Exhibit A made a part thereof, said Circuit Court made its order quashing said writ. That, as is alleged in said petition, the petitioner took an appeal from said order and the Supreme Court

of Florida dismissed said appeal. That said order is in full force and effect, and is an adjudication that due process of law was not denied the petitioner contrary to the Constitution and laws of the United States by the trial Court's refusal to appoint counsel for him. That said adjudication is binding upon the petitioner unless and until reversed in appropriate appellate proceedings, and is res judicata.

That at the time of the trial referred in the petition now before the Court petitioner was under parole granted under the laws of the State of Florida, conditioned as provided by the said parole laws. That in the execution of the sentence imposed upon the petitioner under the judgment of conviction in the Circuit Court of Jackson County, the petitioner was subject to confinement in the State Prison for a period of two years from and after the 10th day of November 1943. That on the 5th day of September, 1944, the petitioner having served nine months and twenty-five days of his sentence, he was released under parole as aforesaid. That on the 30th day of March, 1945, the petitioner was, for violation of the conditions of his parole, retaken and reconfined in the State Prison to serve the remainder of his two year sentence imposed by the Circuit Court of Jackson County. That at the time of his reincarceration on March 30th, 1945, the petitioner had yet to serve under his two year sentence a period of 14 months and 5 days, which period does not expire until the 4th day of June, 1946, and the petitioner is still in custody under the sentence imposed by the Circuit Court of Jackson County, Florida.

That the respondent denies that the petitioner is restrained of his liberty contrary to the laws and Constitution of the United States of America.

(Sgd.) NATHAN MAYO,
(Nathan Mayo)
As State Prison Custodian,
Respondent.

(Sgd.) J. TOM WATSON,
(J. Tom Watson)
Attorney General.
(Sgd.) T. PAINE KELLY,
(T. Paine Kelly)
Assistant Attorney General,
Counsel for Respondent.

MOTION TO QUASH WRIT OF HABEAS CORPUS.

Filed May 17, 1946.

(Title Omitted.)

Comes now the respondent, Nathan Mayo, as State Prison Custodian for the State of Florida, and moves the Court to quash the writ of habeas corpus issued and entered by the Court on the 10th day of May, 1946, in the above cause for the reason that the petition filed by the petitioner herein is insufficient upon which to entitle the said petitioner for the extraordinary relief prayed for in the following respects:

1. That the petition fails to allege or show that the petitioner during the period of time which elapsed between the time of his arraignment and the time when his case was called for trial made any request for the appointment of counsel or to acquaint the Court with the fact that he was not financially able to secure the services of counsel.

2. The petition fails to allege or show that the petitioner had made any effort during the time which elapsed between the date of his arrest and the date of his trial to solicit the aid of any person either through acquaintance, relationship or otherwise to assist him in the securing of counsel or to arrange in his behalf for the securing of counsel.

3. The Petition fails to allege or show that any request was made upon the Court for the continuance of the trial of the case nor the postponement thereof to enable the petitioner to secure counsel or to arrange for the securing of counsel.

4. The petition fails to allege or show that there was no source from which the petitioner might or could secure funds with which to employ counsel to aid in the presentation of his case on trial.

5. The petition fails to allege or show that the petitioner was without property or any other thing of value from which money might or could have been secured with which to employ counsel to aid in the presentation of his case.

6. The petition fails to allege or show either that the age of the petitioner or the extent of his education was insufficient to acquaint him with a realization of his legal rights and the manner in which the same might be presented and defended in a Court of justice.

7. The petition fails to allege or show that the alleged unfamiliarity of the petitioner with the rules of procedure and practice governing the trial under criminal charges in any way interfered with or prevented the presentation by the petitioner of the facts based upon truth in his defense against the charge.

8. That the petition fails to allege or show that at the time of the petitioner's request as alleged in his petition for the appointment of counsel to assist him in his defense he was not familiar with the rules governing practice and procedure in the trial of cases involving violation of the criminal law.

9. It appears from the records of this Court in the case presented that a former petition was addressed by this petitioner to the Court for the issuance of a writ of habeas corpus to effect the discharge of the petitioner from the custody of the respondent under the judgment of conviction and commitment from which his presnet petition seeks a writ. That upon such application for writ of habeas corpus the writ was denied for the reason that the petitioner was then in custody of the respondent under judgment of conviction and commitment upon a former charge of the commission of a criminal offense previously committed and this petition fails to allege or show that the sentence imposed upon the petitioner as punishment for the said former offense has been fully served or completed and that the term for

which the petitioner was confined under the said former offense has terminated.

(Sgd.) NATHAN MAYO,
(Nathan Mayo)
As State Prison Custodian,
Respondent.

(Sgd.) J. TOM WATSON,
(J. Tom Watson)
Attorney General.
(Sgd.) T. PAINE KELLY,
(T. Paine Kelly)
Assistant Attorney General.
Counsel for Respondent.

16 TRANSCRIPT OF PROCEEDINGS.

D. Filed Jun. 14, 1946.

Upon the Hearing of said Matter before His Honor Louie W. Strum, Judge of the above Court, commencing at eleven o'clock in the forenoon, Friday, May 16, 1946.

Appearances:

E. M. Baynes, Esq., appearing on behalf of the Petitioner.

T. Paine Kelly, Esq., appearing on behalf of the Respondent.

The Court:

All right, gentlemen, we will take up this Donald Wade matter now. Donald Wade. Have you got a return, here?

Mr. Kelly:

The respondent has filed a return and motion to quash the petition. We would have filed it earlier, but we did not receive the order until Tuesday of this week—the writ, until Tuesday of this week.

The Court:

(Having examined the file.) All right, gentlemen, I will take the motion to quash under advisement, and you can present it along with the rest of the case and I will rule on all sections at the end of the hearing.

Mr. Baynes:

I would like for the petitioner to be sworn, Your Honor.

The Court:

This return alleges he still is in custody under the wrong sentence?

Mr. Baynes:

It alleges he is in custody under sentence on the case on which he was tried in Palm Beach County, to which we have taken exception.

The Court:

The sentence under which he is held, expires June 4, 1946. Of course, that time is not far off.

Mr. Baynes:

If your Honor please, I would like to offer in evidence a letter from Mr. Mayo, showing that the expiration of his prior sentence, expired on April 20, 1946.

The Court:

Let me see it. Mr. Kelly, did you explain to these gentlemen that they had until June 6th, on this sentence?

Mr. Kelly:

Yes, your Honor. It is a question of mathematics. He was committed to serve a 2-year sentence. He was pardoned on a certain day, after having served a portion of his term. He broke parole on a certain day and was re-committed on the 30th of March of this year. The period of time that he had to serve, when he was re-committed, to fill out his 2-year sentence, does not expire until the 4th of June of this year.

The Court:

Well, that time is so near at hand, I think I will go ahead and hear the merits of the case, and then I can do whatever the law requires, at the time I find from the evidence the sentence will expire; and save everybody the trouble and expense of coming back. Proceed with the evidence in support of your petition. You may file this.

. . . The instrument last above referred to was received and filed in evidence and marked Petitioner's Exhibit No. 1 (being letter of Mr. Mayo referred to.)

The Court:

Bring on your evidence now, to sustain this petition.

Mr. Baynes:

On that question of the expiration of the sentence—pardon me, I want to get a few letters I have written.

The Court:

Well, pass that for the time being. I will hear the merits of the case and if I find the time has not expired, I will determine when it does expire. Let us hear the merits in this case and what they involve.

19 PETITIONER'S CASE.

Mr. Baynes:

I have here a certified copy of the transcript of the habeas corpus proceedings in the Circuit Court of Palm Beach County which gives a history of this case, and which I propose to introduce in evidence, if your Honor please, to show that the matter has been taken before the Courts of Florida.

The Court:

Well, I understand that is admitted. That is set up in the return of the respondent here—I believe that is in here. You do not deny that, do you, Mr. Kelly?

Mr. Kelly:

No, your Honor.

The Court:

All right.

Mr. Baynes:

Then, in the Supreme Court of Florida, a motion to dismiss the appeal, and the judgment of the Supreme Court of Florida is admitted, I think. I think those matters should go into the record.

The Court:

All right, file the judgment of the Circuit Court and the Supreme Court of Florida denying the writ.

Mr. Baynes:

Also the motion to dismiss the apppeal and the order dismissing the appeal, by the Supreme Court of Florida.

. . . The instruments last above referred to were received and filed in evidence and marked Petitioner's Exhibits Numbers 2 and 3 respectively.

DONALD WADE, the petitioner herein, having been produced and first duly sworn as a witness in his own behalf, testified as follows:

20 Direct Examination.

By Mr. Baynes:

Q. Your name is Donald Wade?

A. Yes, sir.

Q. How old are you at the present time, Mr. Wade?

A. 19.

Q. When were you arrested in Palm Beach County, Florida, upon the charge of breaking and entering?

A. February 19, 1945.

Q. 1945?

A. Yes, sir.

Mr. Kelly:

Your Honor, might I ask the witness to speak a little louder?

The Court:

Yes, speak up so everybody can hear you.

Mr. Baynes:

Q. Speak up, Donald, so everybody can hear you. When were you arrested?

A. February 19, 1945.

Q. That was in Palm Beach County, Florida?

A. Yes, sir.

Q. Were you ever tried upon that charge of breaking and entering?

A. The same charge, or any other charge?

Q. The same charge.

A. No, sir.

Q. What charge were you tried upon?

A. Breaking and entering?

Q. Is that what you were arrested for in February 1945?

A. Yes, sir.

Q. How old were you at that time?

A. 18. Come 18, the 13th of February.

Q. In 1945?

A. Yes, sir.

Q. After you were arrested, where did they place you?

A. Palm Beach County jail.

Q. How long were you held in jail?

A. Held until March 14.

Q. What year?

A. 1945.

Q. What happened on that date?

A. I was tried.

Q. Where were you tried?

A. Palm Beach County Court House.

Q. In the Criminal Court of Record of that county?

A. Yes, sir.

Q. How much education have you had?

A. Eighth grade.

Q. Are you familiar with the Court practice and how to proceed in the trial of a case in Court?

A. No, sir.

Q. When did you—did you have a counsel to represent you in the trial of this cause?

A. No, sir.

Q. Did you try to get an attorney to represent you?

A. Yes, sir.

Q. Who tried for you?

A. No one.

Q. I say, who tried to get counsel for you, to represent you?

A. My mother and father tried, but they were unable to get one.

Q. Why?

A. They didn't have no—

Mr. Kelly:

If the Court please, I do not want to get captious, because I know the Court is as anxious as we are to have these facts discussed, but I do not see how this witness can intelligently reply how someone else made an effort, and what effort they made.

The Court:

Yes, that would be hearsay on the part of this witness.

Mr. Baynes:

Q. Do you have any property of your own?

A. No, sir.

Q. Do you have any money of your own?

A. No, sir.

Q. Did you have any, at that time?

A. No, sir.

Q. Did you have any property of your own at that time?

A. No, sir.

Q. Were you able to employ counsel to represent you in the Criminal Court of Record of Palm Beach County?

A. No, sir.

Q. When did you first—or, did you ever ask the Court to appoint counsel for you in the trial of this cause?

A. Yes, sir.

Q. When did you do that?

A. March 14, the day I was tried.

Q. Was that before the trial began?

A. Yes, sir.

Q. Why had you not asked the Court prior to that time?

A. Well, I had never been over there before and thought my mother and father would get one for me.

Q. You were up there without counsel, and before the trial of the case, you asked the Judge to appoint you a lawyer to represent you?

A. Yes, sir, the Judge and Mr. Roebuck.

Q. Did the Judge make any remark to you at the time?

A. No, sir, he didn't.

Q. You just asked for counsel, and what did the Judge reply?

A. He told me I didn't need one.

Q. And you went to trial and were convicted before the jury without a lawyer representing you, at that time?

A. Yes, sir.

Mr. Baynes:

You may examine.

Cross Examination.

By Mr. Kelly:

Q. Do I understand you, Donald, to say that the reason that you did not make request upon the Court, or any of the Court's officers for the appointment of counsel to assist you in your defense until the day of the trial, was because you had not been over there prior to that time?

A. Yes, sir.

Q. Where were you arraigned?

A. I wasn't arraigned, that I can remember.

Q. You can't remember your arraignment?

A. No, sir.

Q. Do you know what an arraignment is? Do you not?

A. No, sir, not exactly.

Q. Not exactly?

A. No, sir.

Q. What is your conception of the process of arraignment?

A. I can't understand yet. I don't know.

Q. Do you recall on February 20, 1945, going into the Court Room in the presence of the Judge of the Court and the prosecuting attorney, answering to your name and being advised on the charge under which you were held in custody, and a request that you plead guilty or not guilty?

A. It was in the District Attorney's room, wasn't it. Mr. Roebuck's room?

Q. Do you recall being arraigned? Do you recall being called before the Court?

A. No, sir, I don't.

Q. And having the indictment read to you?

A. No, sir, only on the 14th of March.

Q. Were you in the Court room on March—the day in March on which your case was set for trial?

A. No, sir, the only two days I was over there was the day I was tried, which was March 14th, and sentenced the next day, which was March 15th.

Q. You state that they were the only two occasions upon which you were in the Court Room in Palm Beach County, the Court Room of the Criminal Court of Record?

A. No, sir, I had been in there before, but not on this same charge.

Q. When were you there before, on other charges?

Mr. Baynes:

If your Honor please, that is immaterial and irrelevant to this charge.

Mr. Kelly:

It is relevant to determine whether or not the witness was in the Court Room.

The Court:

Overruled. Proceed.

. . . The question was read.

A. I was there in November, '44.

Mr. Kelly:

Q. When were you arrested on the charge of breaking and entering upon which you were tried in Palm Beach County, Mr. Wade?

A. February 19.

Q. February 19?

A. 1945.

Q. You were taken to the County jail in Palm Beach County at the time of your arrest?

A. No, sir.

Q. Where were you taken?

A. Palm Beach police station.

The Court:

You say you were arrested in February or January?

A. February.

Q. Of 1945?

A. Yes, your Honor.

By Mr. Kelly:

Q. On the 19th of February?

A. Yes, sir.

Q. Your recollection is clear on that?

A. Yes, sir.

Q. On the next day, were you not taken to the County Court House, to the Court room of the Criminal Court of Record of Palm Beach County?

A. On the same day I was turned over to the County, over in Mr. Roebuck's office, and then taken to the Palm Beach County Jail.

Q. Well, when was the first time that you were taken, or that you appeared in the Court Room in Palm Beach County?

A. February 14.

Q. That is your recollection?

A. Yes, sir.

Q. You have answered counsel, in answer to a question as to your familiarity with Court procedure. Your answer was a categorical no. Have you ever had any experience with Court procedure, or had you had prior to the occasion on which you were tried in Palm Beach County?

A. Yes, sir, I was tried and sentenced before. I never pled not guilty; never knew Court procedure. Just going before the Judge and being sentenced.

Q. On how many occasions have you been tried in other Courts than the Court of Palm Beach County?

A. One time.—Besides the Court in West Palm Beach, and I was tried in 1943 in Palm Beach County.

Q. In Palm Beach County?

A. Yes, sir.

Q. You were tried in Jackson County, were you not?

A. Yes, sir.

Q. When was that?

A. That was in November, 1943.

Q. You appeared, then, in Court, before the Court and jury?

A. No, sir, no jury.

Q. No jury?

A. No, sir.

Q. On that occasion you plead guilty to the charge?

A. Yes, sir.

Q. You were familiar, then, with the procedure of arraignment and in the entry of a plea, were you not? Prior to the time when you were apprehended for the offense in Palm Beach County?

A. Yes, sir, I knowed to plead guilty or not guilty.

Q. How is that?

A. I knowed to plead, yes, sir.

Q. When did you plead in this case in Palm Beach County?

A. March 14.

Q. You did not enter a plea to that charge until the day you were tried?

A. Except Mr. Roebuck.

Q. Mr. Roebuck was who?

A. The prosecuting attorney.

Q. The Court officer, was he not?

A. Yes, sir.
Q. You did enter a plea before him?
A. To him, yes, sir.
Q. Where was that done?
A. In his office.
Q. When?
A. The day that I was picked up and arrested, March —February 19.
Q. The day you were picked up and arrested?
A. Yes, sir, and turned over to Palm Beach County.
Q. You entered a plea on that day?
A. To him, yes, sir.
Q. What plea?
A. Not guilty.
Q. Do you know when the information against you was entered in the Court records?
A. No, sir, I don't.
Q. Did you, yourself, make any effort during the time elapsing between the date of your arrest and confinement, until the date of your trial, to secure the services of counsel?
A. Only through my father and mother. I tried to get them to get one.
Q. Did you consult with any counsel at all during that period of time?
A. No, sir.
Q. At the jail?
A. No, sir.
Q. Or at any other place?
A. No, sir.
Q. Were you represented by counsel on any of the previous occasions upon which you were convicted of violations of the criminal code?
A. No, sir.
Q. Donald, I understand you to say that you are entirely unfamiliar with Court procedure. How did you

determine that you had a right to request of the Court that counsel be assigned to your case and in your defense?

A. Well, my mother and father told me that I had a right to, and, they couldn't get one for me.

Q. How long was that prior to the trial?

A. I can't remember.

Q. You were informed, then, by your parents, that it was the duty of the Court to appoint an attorney to assist you in your defense?

A. I said, the Court would probably give me one if I would ask for one.

Q. Did anyone else inform you of the right?

A. No, sir.

Q. Did you, at the time of making the request of the Court for the appointment of counsel to assist you in your defense, know what would be the result of the Court's denial of your request?

A. No, sir.

Q. Had you been informed by anyone?—With respect to the effect of the denial by the Court to grant your request for counsel?

A. No, sir.

Q. Do you recall when—how soon after the trial you were advised of the fact that the Court erroneously denied your request for counsel?

A. All I know is that I was tried without a counsel.

Mr. Kelly:

Will you read the question?

. . . The question was read.

A. No, sir, I don't.

Mr. Kelly:

Q. Was it that same day?

A. No, sir, they didn't never tell me that I couldn't have one except when I asked them. They never didn't tell me that they wasn't going to give me one.

Q. Donald, I am afraid you are not answering and listening to my question. When did you learn that the Court should have appointed counsel upon your request? How soon after the trial did you learn that it was the opinion of someone that the Court should have granted your request?

A. It was after Mr. Baynes came over to see me.

Q. When was that?

A. I don't remember exactly how many days it was after the trial.

Q. Do you recall executing a petition for writ of habeas corpus to be presented to the Circuit Court of Palm Beach County?

A. Yes, sir.

Q. Do you recall how soon after your trial, that petition was executed by you?

A. No, sir, I don't.

Q. Have you any idea of the number of days that had elasped?

A. No, sir, I don't. I imagine 9 or 10 days or more.

Q. When were you taken to Raiford?

A. Somewhere between March 20th and March 30th.

Q. Was it before March 20th?

A. No, sir, it was between March 20th and before March 30th.

Q. Was it before March 20th that you executed the petition for habeas corpus in the Circuit Court?

A. Yes, sir, I think it was.

Q. Before the 20th?

A. Yes, sir.

Q. Then you were advised that your right to a fair trial had been infringed, between the 15th day of February and the 20th day of February?

A. Yes, sir.

Q. And where was that?

A. Palm Beach County jail.

Q. In the jail.

A. Yes, sir.

Q. Will you please describe, so that the Court may reconcile your reference to procedure, just what was done at the time that you say you pleaded not guilty before the County Solicitor in his office in Palm Beach County? Just what was done at that time? What did the County Solicitor do, and what did you do on that occasion?

A. Well, he called me in his private office and tried to get me to plead guilty to the charge.

Q. Did he read to you, a document directed to you, in which it was set forth that you had, on a certain day, within the County of Palm Beach, feloniously broken and entered, with the intent of carrying away—did he read a paper to you of that kind?

A. I don't remember whether he did or not.

Q. You don't remember?

A. No, sir.

Q. Do you recall ever pleading not guilty, or did you just refuse to plead guilty?

A. I pleaded not guilty.

Q. Well, when you say that the County Solicitor took you to his office and tried to make you plead guilty, just what do you mean by that? What did he do then?

A. He asked me to plead guilty. I plead not guilty to him. He tried to get me to change my plea to guilty.

Q. And that was the day—the first day that you were committed to the County Jail?

A. Yes, sir, the same day for that matter.

Q. The same day?

A. Yes, sir. Then I was taken on over to the county jail.

Mr. Kelly:

I have no further questions.

Re-Direct Examination.

By Mr. Baynes:

Q. You know nothing about how to try a case in a Court?

A. No, sir.

Q. You have never studied any law or anything about it?

A. No, sir.

Mr. Baynes:

That is all. Come down.

(Witness excused.)

Mr. Baynes:

We rest.

RESPONDENT'S CASE.

JUDGE EDWARD G. NEWELL, having been produced and first duly sworn as a witness on behalf of the respondent, testified as follows:

36 Direct Examination.

By Mr. Kelly:

Q. Your name, please?

A. Judge Edward G. Newell.

Q. You are judge of the Criminal Court of Record of Palm Beach County?

A. I am.

Q. Judge, you are familiar wtih the matter presented to the Court this morning?

A. With regard to the—

Q. Growing out of the prosecution and conviction, in your Court in March in 1945, of one Donald Wade. I wish you would tell the Court, please, when the term of Court at which Donald Wade was tried, opened, if you recall?

A. The term at which he was tried, opened in March. March 6th, I believe.

Q. March 6th?

A. 1945.

Q. Will you please state from your recollection, the first occasion upon which the information which had been filed by the prosecuting attorney, against Wade, was brought to your attention?

A. It was brought to my attention the 20th of February, 1945, at the time when Donald and two other alleged accomplices were arraigned.

Q. That was on February 20, 1945?

A. That's correct.

Q. Where did the arraignment take place?

A. In the Criminal Court of Record, Palm Beach County.

The Court:

In open Court, while Court was in session?

A. Open Court, while Court was in session.

By Mr. Kelly:

Q. Will you please state the next occasion upon which you recollect Wade was present in the Court Room?

A. That was on March 6th, when the case was set for trial. 1945.

Q. Then the case was set, as I understand it, for trial on March 14, 8 days thereafter?

A. That's right.

Q. On either of the two occasions, Judge, when Donald was before the Court, at the time of the arraignment and at the time of the sounding of the calendar, did he on either occasion make any request or inform the Court that he intended to make any request for the appointment of counsel to assist him?

A. No, sir, he did not.

Q. Were you informed before that time that he would not have counsel in Court at the time of his trial?

A. I was not.

Q. Did you know of the fact that effort was being made to secure counsel for him?

A. Yes. His sister, whom I have known for a good many years, came to me one time when I was eating lunch and asked me if it would do any good if she would employ counsel for Donald. And I told her the nature of the case and that the other two boys who said they were in this matter with Donald, had entered pleas—

Mr. Baynes:

Of course, what somebody else told him would be hearsay testimony as far as this defendant is concerned.

The Court:

Overruled.

A. And, as I understood it, they expected to testify against Donald. She asked me if I would name a good criminal lawyer, and I said I would not recommend a single criminal lawyer, but I would name three criminal lawyers, who, in my judgment, were capable. I named Mr. Baynes and I named Egbert C. Jackson, and I named Gordon Johnson.

Q. Did you know of any time after that occasion, that the boy had not secured the services of counsel?

A. I did not. I know that the boy's father went to see two of these gentlemen and talked with them about the case.

Q. Then, the request of the accused for the appointment of counsel at the opening of the trial, on the trial day, was the first intimation you had that he didn't have counsel or that request would be made for appointment of counsel?

A. That's right.

Q. What was your action upon his request?

A. I declined to appoint counsel for him.

Q. In your discretion?

A. In my discretion.

Q. What is the practice, Judge, in the Criminal Court of Record for Palm Beach County with regard to the appointment of counsel for those who are without counsel, when brought to trial, and make requests for the appointment?

Mr. Baynes:

If your Honor pleases, as to what is the custom, has nothing to do with what we are the rights of this petitioner in a habeas corpus proceeding. It is a question of law.

Mr. Kelly:

If the answer is immaterial, I withdraw it. It may offend against the rules of evidence, but I am trying to find out what the situation is.

The Court:

Do you want to insist on the question, or not?

Mr. Kelly:

I would like to have the Judge explain to the Court, the customary procedure in the Criminal Court of Record in Palm Beach County, Florida.

The Court:

Proceed. The objection is overruled.

A. It has been my practice that in the more serious charges, that the defendant has counsel. In the less serious offenses I have tried to find out the education of the defendant, his mentality, and if he is unable to understand the rudiments of his own defense, then I appoint counsel, but in other cases, such as this, I do not appoint counsel because, as you well know, there is no provision for the payment of any compensation to appointed counsel.

Q. Nor, any provision for the appointment of counsel except in capital cases?

A. That's correct.

Q. During the course of the trial, Judge, of Wade, on March 14th, he took the stand in his own behalf, did he not?

A. He did.

Q. What was his bearing, and in what way did he present his case to the jury?

A. He just told his story. He was on the stand very briefly, as I recall.

Q. What impression did you get with regard to his mental capacity, from his recital of the facts and circumstances as he proceeded to recite them, surrounding the matter?

A. Well, he presented his case very favorably.

Q. During the course of the trial, was he advised of the fact that he had the right to cross-examine the State's witnesses?

A. He was, and he did cross-examine the State's witnesses.

Q. He did? From your experience as a Judge, did the cross-examination of the State's witnesses exhibit any familiarity with Court procedure?

Mr. Baynes:

I think, if your Honor please, that is asking for a conclusion of the witness. If he wants to get at the facts, all right.

The Court:

Overruled.

A. I don't know that it did, Mr. Kelly.

Mr. Kelly:

Q. Did Wade address the jury?

A. He did not.

Q. Was he informed of the fact that he had a right to address the jury in his behalf?

A. Yes. Neither he nor the Country Solicitor addressed the jury.

Q. Did the State waive the—?

A. That's right.

Q. Was Wade informed he had a right to address the jury if he cared to?

A. He was.

Mr. Kelly:

You may examine.

Cross Examination.

By Mr. Baynes:

Q. He did ask you, as I understand the Court—did he at the time he asked you to appoint counsel for his defense—that was when he was called for trial?

A. Yes.

Q. And you said that you declined to appoint him counsel because of the fact that cases of this character, breaking and entering, it is not the custom to appoint them?

A. Yes. That is, unless the defendant is a wholly uneducated person.

Mr. Baynes:

That is all.

Mr. Kelly:

May I ask some further questions, if your Honor please?

The Court:

Proceed.

Re-Direct Examination.

By Mr. Kelly:

Q. Did you know this boy, Wade, and his family, prior to the time when he came on trial before you?

A. I didn't know Donald. I have known one of his sisters for quite a few years.

Q. Was he a resident of Palm Beach County at that time? Were the family resident of Palm Beach County at that time?

A. Yes, the family has lived there for a number of years.

Mr. Kelly:
That is all. Anything further?

Mr. Baynes:
You may come down.

(Witness excused.)

The Court:
Is that all the evidence?

Mr. Kelly:
The only further evidence we have, your Honor, is documentary evidence which I think, probably, has been —all facts have been admitted, by both the petitioner and the respondent, and that is—I think, in the hearing, before, the prior hearing in this same case, these facts were admitted. That is, the conviction in Jackson County and parole, and the breaking of parole and recommitment and taking the man back into custody. That would be the only other evidence that I have to offer.

The Court:
All right.

Mr. Kelly:
If that is a matter of record, and the other—

The Court:
Do you admit those facts?

Mr. Baynes:
Yes, we admit those facts.

The Court:
Do counsel wish to be heard in argument?

Mr. Baynes:

I don't believe we have the indictment or the information and the sentence of the Criminal Court of Record, in the record, that I would like to put in.

Mr. Kelly:

You may have it there.

Mr. Baynes:

Yes, sir.

Mr. Kelly:

It was admitted he was indicted and he was tried and—

The Court:

Was he indicted or informed against?

Mr. Kelly:

Informed against.

The Court:

When was the information filed?

Mr. Baynes:

We have the information here. It seems to have been filed on the 19th day of February, 1945, and he was sentenced on the 15th day of February—of March, 1945. We would like to get in the record, the information and the judgment.

The Court:

What was the date of the commitment?

Mr. Baynes:

19th day of—

The Court:
I mean, commitment after judgment.

Mr. Kelly:
We have all those documents in here, your Honor.

Mr. Baynes:
If your Honor please, if you will excuse me just a second?

The Court:
I think it is in the respondent's return. The date of the commitment.

The Clerk:
March 30th, 1945, was the date of the incarceration.

Mr. Kelly:
No, that was incarceration upon the former charge.

The Court:
The commitment, what was the date of that?

Mr. Kelly:
That was—I have a certified copy of it.

The Court:
What was the date of it? The commitment under which he was held in Raiford?

Mr. Kelly:
14th day of March, 1945.

The Court:
That could not be. He was not sentenced until the 15th day. There is something wrong somewhere.

Mr. Kelly:

From where did we get that date, your Honor? The 15th?

The Court:

Mr. Baynes just stated it out of that record, that he was sentenced on March 15, 1945. What is the date of the commitment?

Mr. Kelly:

The minutes of the sentence, are followed by an insertion "It is ordered by this Court that this Court should now recess until Thursday, March 15, 1945, at 9:30 A. M." He was sentenced the 14th.

The Court:

Was the commmitment issued that same day?

Mr. Baynes:

I don't have it.

The Court:

Let me see the return, there.

Mr. Kelly:

The 14th day of March. Here is a certified copy of it.

The Court:

March 14th.

Mr. Kelly:

No, the commitment—

The Court:

That is what I am talking about, the commitment. What date is it. Here it is in the first paragraph of, "held by virtue of commitment issued out of the Crim-

inal Court of Record of Palm Beach County, March 14, 1945". Do you wish to make any argument?

Mr. Baynes:

Upon the matter of determining when the sentence is over with, I have here, copies of letters, and letters from Mr. Mayo's office showing the date of the expiration of the sentence from Jackson County, and this sentence follows immediately.

The Court:

Well, I have this letter from Mr. Mayo.

Mr. Kelly:

I may have some comment to make, if Your Honor please, if I knew the contents of that letter.

The Court:

You can read it.

Mr. Baynes:

He sent me a time table here, from which you can figure, under a recent decision of the Supreme Court.

Mr. Kelly:

Well, that is the very point I want to call to the Court's attention.

The Court:

Here is a letter from the Commissioner, himself, and he said the sentence expired April 20th.

Mr. Baynes:

First he said March 26th, then he changed it to April 20th.

Mr. Kelly:

If the Court please, it clearly appears from the correspondence and the remarks of counsel that that date was reached by the giving advantage for gained time, which the Supreme Court of Florida has held a prisoner is not entitled to, after breaking parole. That is the case of Deer against Mayo. Of course, I understand, if your Honor please, the sentence will expire in a few days, June 4th.

The Court:

It depends on whether I am going to act now or later on. That is all. What do you want to say in argument, if anything.

Mr. Baynes:

If your Honor please, so far as the law is concerned, I think your Honor is familiar with the very position we have taken in this case. I am following the four recent cases—

The Court:

If you are looking for those habeas corpus cases, I have read them all.

Mr. Baynes:

I was going to call your Honor's attention to that and, I do not think it is necessary to argue this case. If I understand those cases, they mean this: When a man is charged with a serious offense, at the age that this boy is, and the education he has, that it is the duty of the Court to appoint counsel. I want to call the Court's attention to a recent case of the Supreme Court of Florida. A case, where it seems they have taken a little bit different view of this very question before your Honor today, in which they say that you—that a fair and im-

partial trial contemplates counsel, compulsory attendance of witnesses and time in which to prepare for trial. In other words the Supreme Court of this State has taken the position that to have a fair and impartial trial, you have to have counsel and an order of compulsory attendance of witnesses and time for trial, and, of course, a jury. A fair and impartial jury. And, if your Honor pleases, you are familiar with the law in 89 Law Edition, and it would be taking up the time of the Court to call your Honor's attention to it from the recent House case, which has been before your Honor.

Mr. Kelly:

It is not my desire to take up the Court's time, but I feel I would like to present to the Court, my view with regard to this particular question before the Court and the reliance that counsel makes upon the four Federal Court cases, the Supreme Court of the United States cases, cited in the last volume of Law Edition.

The question to be presented to the Court this morning was not involved in any one of those cases. My view of the question is this, if the Court pleases, in short: The right of an accused to be represented by counsel at his trial, is undenied. He cannot be deprived of that right. There is no procedure whereby he can be deprived of that right. Under the Federal practice, under the sixth amendment to the Federal Constitution, he is entitled to be represented by counsel, and the Courts have construed that section to mean that if he does not have, of his own choosing, counsel, it becomes the duty of the Court to appoint counsel or select counsel for him. That, however, is not a question here. The question here is, under the circumstances of this case as they have been disclosed to the Court, was the refusal of the trial judge to select counsel to assist the accused in the presentation of his case, such an act as deprived the accused of due

process of law secured to all persons under the 14th Amendment of the Constitution. It is not in every case that an accused is entitled to the appointment of counsel. That has never been a position taken by any of the Courts. It is only where the circumstances surrounding the particular case are such that the refusal of the Court to select counsel to represent the accused will amount to a deprivation of the rights of due process.

It is a delicate thing for any judge to do, to be called upon to select counsel to represent an accused who is appearing in his Court, upon a criminal charge. It is not a usual thing. It is not a general thing. And, as I take it—as I see it—whether the Courts agree with me or not, it is an unfair burden to place upon the Judge, to have him sit as a judge in a case and also select the counsel to represent the case to him for adjudication. It is foreign to our system. It is entirely foreign to our system.

The Court:

Have you read the case of Johnson versus Zerbst?

Mr. Kelly:

Yes, sir.

The Court:

It is not foreign to our system is it?

Mr. Kelly:

I may have been expressing my own view about it being foreign to our system. I said the Courts would probably not agree. However, I do stress that for the purpose of presenting to the Court that it is not every case in which an accused asks or requests appointment of counsel to assist him in his defense, that the Court is required to grant the request. It is only in such

cases as the Court feels that a refusal will deprive the accused of due process of law.

Now, in this case, as Judge Newell has explained to the Court, it is the custom in his Court to appoint counsel where the circumstances require it, and that, if the Court please, under the 14th amendment, is as far as the Court is required to go. We are not in a position where this petitioner is a Federal prisoner. He is a State prisoner and the same rule does not apply. If the Court feels that the Judge of the Criminal Court, upon that request being made for the appointment of counsel, from his knowledge of the circumstances and from his acquaintance with the defendant, in the exercise of his discretion felt that it was not a case wherein the refusal to appoint counsel would amount to a deprivation of due process of law, then he was perfectly justified in denying the request.

If the Court please, this is really not a new question. It has been called a new question before our Court, but not a new question. It is fundamental, and the reading of all of these cases, United States Supreme Court cases, including our celebrated House case, will still give the Court—will leave the Court confronted with that one governing proposition, and that is, is the Judge of the Criminal Court, duly constituted, is he to be condemned for exercising his discretion upon an extraordinary request made by an accused when, under the circumstances, he feels that the accused is not or has not been jeopardized by the refusal of the request. Thank you.

Mr. Baynes:

If your Honor please, I would like to give your Honor the decision from the Circuit Court of Appeals of the District of Columbia. It is practically on all four with this particular case.

The Court:

All right, let me have it, and the file.

All right, gentlemen, I will take the matter under advisement and let you hear from me. Meanwhile, the custody of the petitioner will remain as it now is.

. . . There being no further proceedings before the Court, the Court adjourned.

* * * * * *

55 PET. EXHIBIT 1.

Filed in Evidence 5-17-1946.

The State of Florida,
Department of Agriculture,
Prison Division.

Nathan Mayo, Commissioner.

Tallahassee,
February 28, 1946.

Mr. Eugene M. Baynes,
Attorney at Law,
604 Comeau Building,
West Palm Beach, Florida.

Re: #38067 Donald Wade, WM.

Dear Sir:

Replying to your request for expiration date of the above inmate, advise that the sentence as listed above will expire April 20, 1946. This is a two-year sentence from Jackson County on a charge of Burglary.

Wade will then take up a five-year sentence on charge of Breaking and Entering from Palm Beach County. The expiration date for this sentence cannot be figured until the sentence is actually begun.

Very truly yours,
(Sgd.) NATHAN MAYO,
(Nathan Mayo)
Commissioner.
(Sgd.) By S. L. WALTERS,
Chief Clerk.

SLW:emg

Exhibit Petitioner's #2—Motion of Appellee to Dismiss Appeal filed in Supreme Court of Florida, in case of Donald Wade vs. John Kirk, as Sheriff of Palm Beach County, Florida, (Same as Exhibit "B");

Exhibit Petitioner's #3—Order dated 5/14/45 by Supreme Court of Florida dismissing Appeal, in case of Donald Wade vs. John Kirk, as Sheriff of Palm Beach County, Florida, (Same as Exhibit "C");

Omitted from the Printed Record, being heretofore copied at pages 6 and 7.

58 FINAL JUDGMENT.

Filed May 18, 1946.

United States District Court, Southern District of Florida, Jacksonville Division.

Donald Wade, Petitioner,
vs. #845 J Civil.
Nathan Mayo, as State Prison Custodian, State of Florida, Respondent.

The Court has heard the evidence of the respective parties and the argument of their counsel. It appears that petitioner, at the time of his trial in the Criminal Court of Record of Palm Beach, Florida, was eighteen years old, and though not wholly a stranger to the Court Room, having been convicted of prior offenses, was still an inexperienced youth unfamiliar with Court procedure, and not capable of adequately representing himself. It is admitted by the Judge who presided at petitioner's trial on March 6, 1945 that petitioner in open Court, before trial commenced, requested said Judge to appoint counsel for him, but the request was denied and petitioner placed on trial without counsel. Section 11 of the Declaration of Rights of the Florida Constitution provides that "in *all* criminal prosecutions, the accused * * * shall be heard by himself, or counsel, or both, * * *." The denial of petitioner's request in the circumstances here involved constitutes a denial of due process, contrary to the 14th Amendment of the Federal Constitution, which renders void the judgment and commitment under which petitioner is held. See Deeb vs. State, 179 Sou. 894; Christie vs. State, 114 Sou. 450; House vs. Mayo, 63 Fed. Supp. 169. And the Court further finding that earlier commitments, under which peti-

tioner has been heretofore held, expired on April 20, 1946, and the the commitment under which petitioner is now held, issuing out of the Criminal Court of Record of Palm Beach County, Florida on March 14, 1945 based upon a judgment of said Court of the same date, is void and of no effect for the reasons hereinabove stated, it is upon consideration thereof—

Ordered And Adjudged:

1. Said petitioner Donald Wade be and he is hereby released and discharged from the custody of the respondent Nathan Mayo, as State Prison Custodian, under commitment issuing out of the Criminal Court of Record of Palm Beach County, Florida, dated March 14, 1945, The petitioner, however, is remanded to the custody of the Sheriff of Palm Beach County, Florida, to be by him held for such further proceedings as may be taken by the State of Florida against said petitioner under and by virtue of the information charging breaking and entering with intent to commit a felony, filed in the Criminal Court of Record of Palm Beach County, Florida on February 19, 1945, and the respondent Nathan Mayo is authorized and directed to deliver the body of the said petitioner Donald Wade to the Sheriff of Palm Beach County, Florida, for the purpose last stated.

2. A copy of this judgment shall be served upon the respondent by the United States Marshal for the Northern District of Florida, at the cost of the United States.

Done And Ordered at Jacksonville, Florida, May 18, 1946.

(Sgd.) LOUIE W. STRUM,
(Louie W. Strum)
U. S. District Judge.

(Recorded in Jacksonville Civil Order Book 9, page 786.)

Copies—
Eugene W. Baynes, Comeau Bldg., West Palm Beach,
Hon. J. Tom Watson, Attorney General, Tallahassee,
Hon. Nathan Mayo, as State Prison Custodian, Tallahassee.

59 MARSHAL'S RETURN.

Received this Final Judgment at Tallahassee, Florida, on May 24, 1946, and executed same by serving Nathan Mayo, as State Prison Custodian, with a true copy of said judgment, exhibiting the original, and making the contents known to him.

(Sgd.) J. B. ROYALL,
(J. B. Royall)
United States Marshal.

(Marshal's Return)—Filed Jun. 7, 1946, Jacksonville, Fla. Edwin R. Williams, Clerk.

PETITION FOR CERTIFICATE OF PROBABLE CAUSE.

60 Filed May 28, 1946.

(Title Omitted.)

To the Honorable Louie W. Strum, Judge of said Court:

Now comes the respondent, Nathan Mayo, as State Prison Custodian, State of Florida, by his undersigned

attorneys, J. Tom Watson, Attorney General of the State of Florida, Reeves Bowen, Assistant Attorney General of the State of Florida, and Sumter Leitner, Assistant Attorney General of the State of Florida, and shows here unto your Honor that he desires to appeal to the Circuit Court of Appeals of the Fifth Circuit from that final judgment entered by your Honor on the 18th day of May, 1946, in the above entitled cause, and he asks that your Honor wil enter an order holding that in your opinion there exists probable cause for such appeal.

As grounds for the said asking, your petitioner sets forth the following:

1. The laws of the State of Florida require the appointment of counsel for defendant only in capital cases and when the defendant is insolvent and in no other case.

2. The matter of appointing counsel to represent the defendant is within the discretion of the trial Court and is not compulsory under the laws of the State of Florida save in capital cases where the defendant is insolvent.

3. If it is the duty of the trial Court of the State of Florida in all cases where the defendant is insolvent to appoint counsel to represent the defendant, upon request of defendant, then your petitioner would seek to have this matter decided by a Court of last resort.

4. The question involved in this case, that is, whether or not it is the duty of the trial Court in the State of Florida to appoint counsel to represent indigent defendants in all cases, whether capital or not, upon the request of such defendant, is of such vital importance to the criminal procedure of the State of Florida that this

petitioner feels an appeal should be allowed and that there is probable cause for such an appeal.

Wherefore, your petitioner requests your Honor to enter an order for probable cause as required by Title 28, Section 466, U. S. C. A.

J. TOM WATSON,
(J. Tom Watson)
Attorney General.
REEVES BOWEN,
(Reeves Bowen)
Assistant Attorney General.
SUMTER LEITNER,
(Sumter Leitner)
Assistant Attorney General.
Attorneys for resopndent.

ORDER GRANTING CERTIFICATE OF PROBABLE CAUSE.

63 Filed May 28, 1946.

(Title Omitted.)

This cause coming on this day to be heard upon the petition of the respondent, Nathan Mayo, as State Prison Custodian, State of Florida, for an order of this Court holding that there exists probable cause for an appeal to the Circuit Court of Appeals for the Fifth Circuit from the final judgment entered in this cause on the 18th day of May, 1946, and the Court being of the opinion that there exists probable cause for such an appeal, I, Louie W. Strum, Judge of the above styled Court, do hereby certify that in my opinion there exists probable

cause for such an appeal and hereby grant such certificate of probable cause.

Done And Ordered at Jacksonville, Florida, this 28 day of May, 1946.

LOUIE W. STRUM,
District Judge.

(Recorded Jacksonville Civil Order Book 9, page 803.)

PETITION FOR ALLOWANCE OF APPEAL.

65 Filed May 28, 1946.

(Title Omitted.)

To the Honorable Louie W. Strum, District Judge:

Your petitioner, Nathan Mayo, as State Prison Custodian, State of Florida, respondent in the above entitled cause, deeming himself aggrieved by the order and judgment entered herein on the 18th day of May, 1946, now seeks redress on appeal to the United States Circuit Court of Appeals, Fifth Circuit, at New Orleans, Louisiana, that they may review the matters and things set forth in the transcript and record of proceedings upon which said order and judgment was made, and prays that the said appeal may be allowed and that a transcript and record of the proceedings upon which said order and judgment were made, duly authenticated, may be

sent to the United States Circuit Court of Appeals for the Fifth Judicial Circuit of the United States.

J. TOM WATSON,
(J. Tom Watson)
Attorney General.
REEVES BOWEN,
(Reeves Bowen)
Assistant Attorney General.
SUMTER LEITNER,
(Sumter Leitner)
Assistant Attorney General.
Attorneys for respondent.

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67 ORDER.

Filed May 28, 1946.

(Title Omitted.)

It is considered and ordered that petitioner's motion asking for the allowance of an appeal from the final judgment of the Court, dated May 18, 1946, be and the same is hereby granted.

Done And Ordered at Jacksonville, Florida, this the 28 day of May, 1946.

LOUIE W. STRUM,
District Judge.

(Recorded Jacksonville Civil Order Book 9, page 804.)

68 NOTICE OF APPEAL.

Filed May 28, 1946.

In the United States District Court, Southern District of Florida, Jacksonville Division.

Donald Wade, Petitioner,

vs. No. 845 J-Civ.

Nathan Mayo, as State Prison Custodian, State of Florida, Respondent.

Now comes Nathan Mayo, as State Prison Custodian, State of Florida, respondent,, appellant, by his undersigned attorneys, deeming himself aggrieved by the order and judgment entered herein on the 18th day of May, 1946, does hereby appeal to the United States Circuit Court of Appeals for the Fifth Circuit from the said order and judgment of the said United States District Court for said District, made, given and entered in said Court, wherein on petition for writ of habeas corpus praying for the release of Donald Wade from the custody of the respondent, the petitioner, appellee was sustained and remanded to the custody of the sheriff of Palm Beach County, Florida.

Dated this the 28th day of May, 1946.

J. TOM WATSON,
(J. Tom Watson)
Attorney General.
REEVES BOWEN,
(Reeves Bowen)
Assistant Attorney General.
SUMTER LEITNER,
(Sumter Leitner)
Assistant Attorney General.

70 SUPPLEMENTAL MEMORANDUM.

Filed May 29, 1946.

(Title Omitted.)

In connection with, and as a part of, the Court's judgment of May 18, 1946, the following supplemental conclusions of law are made:

In construing Section 11 of the Declaration of Rights of the Florida Constitution, the Supreme Court of Florida has said:

"These specific provisions are in addition to the rights secured by the general organic requirements of due process of law and equal protection of the law; and all such organic guarantees and commands are designed to secure to an accused a fair trial in every aspect of a criminal prosecution in the name of the State. The *absolute command* of the Constitution that, 'in all criminal prosecutions, the accused * * * shall be heard by himself, or counsel or both,' is more than a right secured to the accused. It is a *mandatory organic* rule of procedure in *all criminal* prosecutions in *all* Courts of this State." (Italics supplied.) Deeb v. State, 179 Sou. 894.

In Wood v. State, 19 Sou, (2) 872, the Supreme Court of Florida further said:

"We are committed to the doctrine that regardless of the heinousness of the crime one may be charged with, he is entitled to a fair and impartial trial by a jury of his peers. The trial contemplates counsel, compulsory attendance of witnesses * * * and steps short of these several requirements defeat the spirit of the law."

As the Supreme Court of Florida has thus construed the provisions of Section 11 of the Declaration of Rights of the State Constitution of Florida as creating a *mandatory organic* rule of procedure, essential to a fair trial, in *all criminal* prosecutions in *all* Courts of the State, the decision in Betts v. Brady, 316 U. S. 455, 86 L. Ed. 1595, does not apply here.

Done And Ordered at Jacksonville, Florida, May 29, 1946.

(Sgd.) LOUIE W. STRUM,
(Louie W. Strum)
U. S. District Judge.

Copies—
Eugene M. Baynes, Comeau Bldg., West Palm Beach,
Hon. J. Tom Watson, Attorney General, Tallahassee, Fla.,
Attention: Hon. Reeves Bowen, Asst. Attorney General.

DESIGNATION OF CONTENTS OF RECORD ON APPEAL.

72 Filed Jun. 14, 1946.

(Title Omitted.)

To the Honorable Edwin R. Williams, Clerk of said Court:

The respondent having taken an appeal to the United States Court of Appeals, Fifth Circuit at New Orleans, from the order and judgment entered in this cause and Court on the 18th day of May, 1946, now directs that

you make up the transcript of record in said cause and to include therein the following:

The complete record and all the proceedings and evidence in the said cause, including:

1. Petition for writ of habeas corpus;

2. Application of Donald Wade for leave to sue as a poor person;

3. Order granting petitioner's motion for leave to proceed in forma pauperis;

4. Return of respondent;

5. Motion to quash writ of habeas corpus;

6. The reporter's transcript of the evidence and proceedings had in said cause, including all exhibits and papers filed at said hearing;

7. Final judgment;

8. Petition for certificate of probable cause;

9. Order granting certificate of probable cause;

10. Petition for allowance of appeal;

11. Order allowing appeal;

12. Notice of appeal with date of filing;

13. The Court's supplemental memorandum;

14. Designation of contents of record on appeal.

Please show the recordation of such of the foregoing as are required to be recorded, and show the date of filing of the others.

(Sgd.) J. TOM WATSON,
(J. Tom Watson)
Attorney General.
(Sgd.) REEVES BOWEN,
(Reeves Bowen)
Assistant Attorney General.
(Sgd.) SUMTER LEITNER,
(Sumter Leitner)
Assistant Attorney General.
Attorneys for respondent-appellee.

State of Florida,
County of Leon.

On this day personally appeared before me, a Notary Public, in and for the State of Florida at Large, Reeves Bowen, Assistant Attorney General, who being first duly sworn, on oath says that he did on this, the 13th day of June, 1946, serve a copy of the above and foregoing designation of contents of record on appeal on the petitioner, Donald Wade, and a copy thereof on the petitioner's attorney, Hon. E. M. Baynes, by mailing one of said copies in a sealed envelope addressed to Mr. Donald Wade, in care of Honorable J. F. Kirk, Sheriff of Palm Beach County, West Palm Beach, Florida, and by mailing the other of said copies in a sealed envelope addressed to Honorable E. M. Baynes, Attorney at Law, 604 Comeau Building, West Palm Beach, Florida, with each of said envelopes bearing sufficient United States

postage stamps to insure delivery at its said destination, and the same being this day deposited by me in the United States mails at Tallahassee, Florida.

(Sgd.) REEVES BOWEN.

Sworn to and subscribed before me this 13th day of June, 1946.

(Sgd.) MARY L. VALLANCE,
Notary Public, State of Florida at Large.

(Notary Seal)

My commission expires March 14, 1950. Bonded by American Surety Co. of N. Y.

United States of America,
Southern District of Florida, ss.

I, EDWIN R. WILLIAMS, Clerk of the United States District Court in and for the Southern District of Florida, and as such the legal custodian of the records and files of said Court, do hereby certify that the foregoing pages numbered 1 to 73, inclusive, contain a true copy of all such papers and proceedings in the cause of Donald Wade, Petitioner, vs. Nathan Mayo, as State Prison Custodian, State of Florida, Respondent, as appear upon the records and files of my office that have been directed to be included in said transcript by the agreement of the parties.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said Court at Jacksonville, Florida, on this the 24th day of June, A. D. 1946.

(Seal)

EDWIN R. WILLIAMS,
Clerk, U. S. District Court,
Southern District of Florida.
By L. GIBSON HOUSE,
Deputy Clerk.

[fol. 67] IN UNITED STATES CIRCUIT COURT OF APPEALS,
FIFTH CIRCUIT

No. 11715

NATHAN MAYO, as State Prison Custodian, State of Florida

versus

DONALD WADE

ARGUMENT AND SUBMISSION—October 23, 1946

On this day this cause was called, and after argument by Sumter Leitner, Esq., Assistant Attorney General of Florida, for appellant, was submitted to the Court.

[fol. 68] IN THE UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 11715

NATHAN MAYO, as State Prison Custodian, State of Florida,
Appellant,

versus

DONALD WADE, Appellee

Appeal from the District Court of the United States for the Southern District of Florida

(November 22, 1946)

Before Sibley, Hutcheson, and Waller, Circuit Judges

OPINION OF THE COURT—Filed November 22, 1946

WALLER, Circuit Judge:

Appellee was convicted in Palm Beach County, Florida, March 14, 1945, in the Criminal Court of Record, for the offense of breaking and entering, which was not a capital offense. On the next day he filed a petition in habeas corpus in the Circuit Court of the State of Florida having jurisdiction in Palm Beach County, alleging that he had been

unable to employ counsel, and that the Criminal Court of Record denied his request for the Court to appoint counsel [fol. 69] to represent him in his trial. The Circuit Court quashed the writ and remanded the Appellee to the custody of the Sheriff of Palm Beach County.

His appeal to the Supreme Court of Florida was, on motion of the Attorney General of the State of Florida, dismissed as frivolous. Having exhausted all available remedies in the state courts, Appellee, on May 10, 1946, filed a petition, with substantially the same allegations, for a writ of habeas corpus in the District Court of the United States for the Southern District of Florida, Jacksonville Division. He was allowed to proceed in forma pauperis and in due course a return to the writ was filed by Respondent. Testimony was taken and upon final hearing the Court below made the following finding:

> "It appears that petitioner, at the time of his trial in the Criminal Court of Record of Palm Beach, Florida, was eighteen years old, and though not wholly a stranger to the Court Room, having been convicted of prior offenses, was still an inexperienced youth unfamiliar with Court procedure, and not capable of adequately representing himself. It is admitted by the Judge who presided at petitioner's trial on March 6, 1945 that petitioner in open Court, before trial commenced, requested said Judge to appoint counsel for him, but the request was denied and petitioner placed on trial without counsel."

The Appellee had, in November, 1943, pleaded guilty in Jackson County, Florida, to a charge of burglary, and had served a portion of his sentence, from which he was on parole at the time of the alleged breaking and entering in Palm Beach County. He had completed the eighth grade [fol. 70] in school. During the progress of the trial in the second case it appeared that Appellee: (a) was advised by the trial Judge of his right to challenge jurors and excuse as many as six without any reason being given therefor; (b) was afforded an opportunity, which he accepted, to cross examine state witnesses; (c) took the stand and testified fully in his own behalf; (d) was offered the privilege of arguing his case to the jury but declined, as did the prosecuting attorney.

There were no complicated questions of law involved in the trial but only simple questions of fact.

Two others who were charged with the offense jointly with Wade pleaded guilty.

The Court below, after hearing the evidence, was of the opinion, and so held, that under Section 11 of the Declaration of Rights of the Florida Constitution[1] and certain Florida decisions[2] the refusal of the trial Court to appoint an attorney to defend Petitioner was a denial of due process under the laws of Florida, contrary to the Fourteenth Amendment to the Federal Constitution.

In undertaking to determine what the Florida law on the subject is we note that Sec. 909.21, Florida Statutes, 1941,[3] requires the appointment by the court of counsel to defend indigent persons only in capital cases. This statute makes it mandatory for the court to appoint attorneys for indigent persons in capital cases and to pay [fol. 71] them out of the public treasury, but there is no requirement that counsel be appointed to represent a defendant in a non-capital case, and there is no authority to pay counsel for defending such a case in the event the court, in the exercise of its discretion, did appoint one.

In *Watson v. State*, 194 So. 640, 142 Fla. 218, decided March 8, 1940, the Supreme Court of Florida said:

> "While it is true that the help or assistance of able and resourceful counsel during the progress of trial cannot be questioned, this Court is without power to reverse a case because the defendants in a criminal case were not represented by counsel and for that reason failed to obtain a fair trial. The Legislature

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[1] "In all criminal prosecutions, the accused shall have the right to a speedy and public trial, by an impartial jury, in the county where the crime was committed, and shall be heard by himself, or counsel, or both, * * *." Sec. 11, Declaration of Rights, Fla. Constitution.

[2] Deeb v. State, 179 So. 894; Christie v. State, 114 So. 450.

[3] "In all capital cases where the defendant is insolvent, the judge shall appoint such counsel for the defendant as he shall deem necessary, and shall allow such compensation as he may deem reasonable, such sum to be paid by the county in which the crime was committed." Sec. 909.21, Florida Statutes, 1941.

of Florida, by the enactment of Section 8375, C. G. L.,[4] restricts the power of the courts to appoint counsel for indigent defendants at public expense to capital cases. The case at bar is not a capital case and therefore no duty rested on the lower court to supply counsel for plaintiffs in error at public expense."

In *Johnson v. State*, 4 So. 2d 671, 148 Fla. 510, decided November 21, 1941, the Court said:

"There was no duty resting upon the trial court to appoint counsel to represent the accused as he was not charged with a capital offense. See Sec. 157, Criminal Procedure, Acts 1939, c. 19554; *Watson et al. v. State*, 142 Fla. 218, 194 So. 640."

It is not necessary, however, for us to review other cases for it seems that the Supreme Court of Florida has decided the very case before us. Attention was called [fol. 72] heretofore to the fact that the Florida Supreme Court had sustained the Attorney General's motion to dismiss Wade's appeal as frivolous. No opinion was written in that case, but on October 6, 1946 [since the rendition of the opinion by the lower Court in the present case], in the case of *John R. Johnson, Petitioner, v. Nathan Mayo, as State Prison Custodian* [not yet officially reported], that Court had before it the petition of Johnson for a writ of habeas corpus, alleging that he was brought to trial in Madison County, Florida, for the larceny of an automobile, a non-capital felony, and forced to go to trial without counsel, notwithstanding the fact that he had stated to the Court that he was without funds with which to employ counsel and had requested that the Court appoint counsel for his defense. His contention before the Supreme Court was that the trial Court, by refusing to appoint counsel to defend him, violated Sec. 11 of the Declaration of Rights of the Constitution of Florida and the Fourteenth Amendment to the Federal Constitution, by reason of which his conviction, judgment, and sentence were void. The sole question presented to the Supreme Court of Florida was whether or not under the Constitution and statutes of Florida the Judge of the trial Court was required to appoint

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[4] Same as Sec. 909.21, Florida Statutes, 1941.

counsel to defend an indigent defendant in a non-capital case. The Supreme Court said:

"The only statute which we have in this State touching upon the question here under consideration is Section 909.21 Fla. Statutes 1941 (Same F. S. A.), which provides for the appointment by the trial Judge of counsel for an insolvent defendant who is charged with a capital offense. This section of the statute limits requirement that counsel be appointed by the [fol. 73] court for indigent defendants to those defendants who are charged with the commission of a capital offense. Our construction of Sec. 11 of our Declaration of Rights is that any defendant charged with a felony in the courts of this state shall have the right to be heard in his own defense in his own proper person and also by counsel, if he has counsel, and presents himself and his counsel at the bar of the court where he is to be heard. But this constitutional provision does not require that he should provide himself with counsel, nor does it require that the State should furnish him with counsel to be selected and appointed by the trial court.

"We have repeatedly held that in cases where the charge was less than a capital offense no duty rested upon the trial court to supply counsel for the defendant. See *Cutts v. State,* 54 Fla. 21, 45 Sou. 491; *Watson et al. v. State,* 142 Fla. 218, 194 Sou. 640; *Johnson v. State,* 148 Fla. 510, 4 Sou. (2) 671.

"In May, 1945, Donald Wade presented his appeal to this Court from a judgment quashing a writ of habeas corpus theretofore issued by the Circuit Court of Palm Beach County on the petition of Donald Wade alleging that he had been unlawfully convicted of the commission of a felony in Palm Beach County in that 'at the time of his trial, conviction and sentence he was without aid of counsel and the court did not make an appointment of counsel, nor did petitioner waive his constitutional rights to the aid of counsel, and he was incapable adequately of making his own defense, in consequence of which he was compelled to go to trial without the aid of counsel.' It was also alleged that he was ignorant and was also, because of lack of funds, unable to employ counsel; and that he requested the

court to appoint counsel for him. He further alleged that he was not guilty of the offense charged:

[fol. 74] "Motion was made to dismiss the petition on the ground that the appeal was frivolous and on May 14th, 1945 we entered an order granting the motion to dismiss on the ground stated.

"We recognize the fact that in a great number of cases in other jurisdictions courts have construed provisions of respective State Constitutions similar to ours to guarantee to a defendant charged with a felony the benefit of counsel.

"We are also cognizant of the rule in the Federal Courts but we are of the view that those decisions do not control in Florida."

That opinion, giving the reasons for dismissing the petition of Wade wherein was raised the same ground as he has raised here, we think is decisive.

We, of course, are aware of the rule in federal courts which requires the appointment of counsel to represent indigent persons charged with any felony, but that rule is based upon an interpretation of the Sixth Amendment to the Federal Constitution which is applicable only in the federal courts.

We are also cognizant of the decisions of the United States Supreme Court such as *Williams v. Kaiser*, 323 U. S. 471; *Rice v. Olson*, 324 U. S. 786; *Henry Hawk v. Olson*, 324 U. S. 839, and *White v. Ragen*, 324 U. S. 760, which at first blush would create the impression that the case of *Betts v. Brady*, 316 U. S. 455, has been overruled. A careful analysis, however, of those later cases[5] convinces

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[5] Williams v. Kaiser, 323 U. S. 471, was a case from Missouri where the state statute required the appointment of counsel to defend an indigent person charged with robbery, a first degree felony.

In Rice v. Olson, 324 U. S. 786, Petitioner was an Indian who committed the crime of burglary on an Indian reservation over which the United States Court had exclusive jurisdiction. It arose in Nebraska, which has a statute [R. S. 1943, Crim. Proc. Art. 18, § 29-1803] which reads in part as folllows:

"Counsel for accused, assignment by court, counsel fees allowance—When any person shall be indicted for

[fol. 75] us that the Court has neither overruled nor modified its opinion in *Betts v. Brady*, supra.

We have been cited to no case decided by the Supreme Court of the United States holding that the failure to appoint counsel to represent a defendant in a non-capital case in a state court is a denial of due process under the Fourteenth Amendment unless the law of the state requires such an appointment.

The judgment of the Court below is reversed and remanded for further proceedings not inconsistent with the views herein expressed.

Reversed and Remanded.

[fol. 76] In United States Circuit Court of Appeals

No. 11715

Nathan Mayo, as State Prison Custodian, State of Florida,

versus

Donald Wade

Judgment—November 22, 1946

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Southern District of Florida, and was argued by counsel;

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an offense which is capital or punishable by imprisonment in the penitentiary, the court is hereby authorized and required to assign to such person counsel, not exceeding two, if the prisoner has not the ability to procure counsel, and they shall have full access to the prisoner at all reasonable hours."

In Henry Hawk v. Olson, 324 U. S. 839, Petitioner was charged with murder in the first degree. This case also arose in Nebraska and was governed by the statute in the preceding paragraph.

White v. Ragen was a case arising in Illinois where the state statutes require the court to appoint counsel in all criminal cases where the defendants are unable to procure counsel. [See footnote 28, Betts v. Brady, 316 U. S. 455 (text, 470), citing Ill. R. S. 1935, c. 38, paragraph 730.]

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, reversed; and that this cause be, and it is hereby, remanded to the said District Court for further proceedings not inconsistent with the opinion of this Court;

It is further ordered and adjudged that the appellee, Donald Wade, be condemned to pay the costs of this cause in this Court, for which execution may be issued out of the said District Court.

[fol. 77] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 78] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1947

No. 40

ORDER GRANTING MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS—June 9, 1947

On Consideration of the motion for leave to proceed *in forma pauperis* in this case.

It Is Ordered by this Court that the said motion be, and the same is hereby, granted.

[fol. 79] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1947

No. 40

ORDER ALLOWING CERTIORARI—Filed June 9, 1947

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit is granted, and the case is transferred to the summary docket.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.